

WILLCOX & SAVAGE

## EMPLOYMENT LAW OUTLOOK



### TO TEST OR NOT TO TEST? DEVELOPING AN EFFECTIVE SUBSTANCE ABUSE PROGRAM

Samuel J. Webster



Substance abuse—alcohol, prescription drugs, illegal drugs—continues to cost employers: absenteeism/sick leave, overtime, tardiness, insurance and workers' compensation claims, diverted supervisory time, co-worker animus, poor decision-making, damage to equipment and personnel. Companies lose real money from persons with substance abuse problems and risk even higher losses from potential personal injuries. How may employers combat this continuing plague within the confines of the law? First, supervisors should learn to recognize substance abuse:

**Deteriorated job performance:** absenteeism and "on the job absenteeism"; higher accident rate; difficulty in concentration; confusion; spasmodic work pattern; holding on to current position; poor co-worker relations.

**Physical signs:** deterioration of physical appearance (eyes, nose and mouth, skin, drowsiness), clothing and grooming;

**Behavioral characteristics:** aggressive behavior, including irritability, argumentativeness, paranoia, nervousness; exaggerated passive behavior; deterioration of personal relationships.

By observing workers for the above characteristics, employers may divert a substance abuser into an Employee Assistance Program which, if successfully followed, would return that person to being a productive member of the employer's team. Failure to do so could result in more serious injury or damages at the workplace and possible legal exposure to both the company and abusing employee. An effective substance abuse program, including drug and alcohol testing, both enhances employees' lives and leads to increased safety and productivity.

Federal regulations already subject many employers to drug and alcohol testing (e.g., DOT regulations covering truck drivers, certain railroad employees, pilots). Congress, by the Drug-Free Workplace  
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### EMPLOYERS MAY PAY A HIGH PRICE FOR VIOLATIONS OF COVENANTS NOT TO COMPETE

Andrew R. Fox



Potential new hires who have experience in your field can bring a winning combination of expertise, ingenuity, and a fresh perspective to your business. Sometimes, however, they also come saddled with covenants not to compete with their former employer. In that situation, the employer must then weigh the legal and practical risks and advantages of bringing the new employee onboard.

The obvious risk that the employer faces is that the former employer will sue to enforce the contract and win an injunction preventing the new employee from working for the competitor. This could result in considerable inconvenience, lost business, and loss of investment in training and orienting the new employee. However, as a recent case from Northern Virginia illustrates, the disadvantages of hiring an employee in possible violation of a noncompete agreement can be far worse.

In that case, a large department store lured two highly successful clothing salesmen away from a specialty store in the same shopping center. The salesmen had signed an agreement not to work for any competitor within a one-mile radius for three years. The department store's corporate counsel, who was not admitted to practice in Virginia, formed the opinion that the noncompete agreement was invalid and advised the store to proceed with hiring the salesmen. Corporate counsel also advised the salesmen that they could contact their former customers and solicit their business.

The Judge determined that the covenant not compete was enforceable based on the extremely small radius of restriction and the damage the former employer's business would unfairly suffer by losing two longstanding salesmen to a direct competitor. He then entered an injunction preventing the salesmen from working for the department store at that location for three years. But that was just the beginning.

CONTINUED ON BACK COVER

## TO TEST OR NOT TO TEST? DEVELOPING AN EFFECTIVE SUBSTANCE ABUSE PROGRAM

CONTINUED FROM FRONT COVER

Act of 1988, now requires that employers with federal contracts worth at least \$100,000 or employers who receive federal grants must certify that they will provide a drug-free workplace. Experts encourage employers to take the following steps with regard to their drug-free workplace compliance:

- strike a balance between discipline and deterrence;
- avoid policies and practices that undermine the effectiveness of the program (e.g., not including alcohol abuse as part of the program);
- refuse to accept substance abuse as a cost of doing business;
- avoid overly relying on drug testing;
- focus on rehabilitation rather than termination;
- be willing to confront abusers;
- avoid reinforcing a user's denial;
- avoid restricting access to treatment for alcoholism/addiction.

A workplace substance abuse program has five ingredients: a written substance abuse policy; supervisor training; employee education and awareness; an employee assistance program; a drug testing program. These ingredients are arranged in a logical order. What follows is a checklist of factors for consideration prior to instituting drug and alcohol use testing:

### I. Determine whether a workplace substance abuse policy is necessary or appropriate.

This factor involves considerations of applicable federal, state or local regulations requiring or limiting drug and alcohol testing; union involvement; prevalence of substance abuse in the particular workplace; costs associated with implementing a drug and alcohol testing program; the effect upon employee morale. Effective workplace substance abuse programs in the long run have proven to save the employer money, increase safety and productivity, and, in the appropriate circumstance, restore a person to being a valued member of the company's team.

**II. Develop a written substance abuse policy.** The policy must contain the following elements: definition of terms, description of what is prohibited; detailing which individuals may be subject to testing and when; description of the collection/testing process; defining consequences of positive test results; confidentiality provisions; description of employee awareness and education, and employee assistance programs or referrals. Both supervisors and employees must understand, acknowledge, and agree to abide by the program. We recommend having the program reviewed by legal counsel.

**III. Implement the substance abuse policy.** This step includes providing adequate education and awareness programs for supervisors and employees, and testing. With regard to actual testing, an employer must assure that notice and consent requirements have been followed, conducting only the tests specified in the policy. The company must make nondiscriminatory, fair and reasonable selection of employees for testing, follow proper sample collection and chain of custody procedures, use a qualified and competent laboratory, follow confidentiality and documentation requirements, and follow nondiscriminatory and fair steps when positive tests occur.

With regard to administering any discipline, the employer must consider whether any federal, state or local laws apply to the discipline, whether the discipline is consistent with the written policy and appropriate for the offense. Above all, the employee must administer any discipline in a nondiscriminatory and fair manner. The employer should consider any past history of abuse and the employee's willingness to enter an Employee Assistance Program and thereafter following any "last chance" procedures.

By implementing a fair and effective drug-free workplace policy and program employers have an excellent opportunity to reduce substance abuse in their workplace. By drafting a nondiscriminatory, fair and effective program and then providing serious drug and alcohol awareness education and training to both supervisors and employees in drug and alcohol abuse prevention, and keeping the topic before employees, companies will increase both safety and productivity. Employers will also do a great service to society at large and probably reduce overall healthcare costs by both the awareness and education parts of the program and by the Employee Assistance Program. The steps are easy; the implementation is difficult; the reward is high. ■

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## EMPLOYMENT RECORD RETENTION REQUIREMENTS VARY

Timothy M. McConville



Employers faced with increasing amounts of employment records and decreasing amounts of space in which to store the records are typically interested in how long they are required to maintain selected documents. As with many general legal questions, the answer is: it depends.

With regard to employment records, the duration of the obligation to maintain a particular record depends on what information appears in the record and the particular law being applied. The record retention issue can become even more complex because multiple statutory or regulatory requirements—each with its own record retention period—may apply to the same document. The chart on the following page provides a summary of record retention periods applicable to employment records under federal and Virginia law. For a complete and precise description of the types of records to be retained, and the retention periods, the applicable statute or regulation should be consulted.

We hope you find our quarterly newsletter informative and useful. If there is a topic you would like covered, or would like to receive this newsletter via e-mail, please contact Michelle Shearon at 757-628-5631 or e-mail [mshearon@wilsav.com](mailto:mshearon@wilsav.com). This publication is provided for general purpose information. It is not and should not be used as a substitute for legal advice. Copyright 2005 Willcox & Savage

## EMPLOYMENT RECORD RETENTION REQUIREMENTS

APPLICABLE STATUTE/REGULATION	SUMMARY OF TYPE OF RECORD TO RETAIN	PERIOD OF RETENTION
Age Discrimination in Employment Act	Payroll records	3 years
	Personnel records concerning: hiring; termination; promotion; demotion; job advertisements/notices of job openings, promotions, training, overtime opportunities; training records; transfer; layoff; recall; job orders submitted to employment agency; employment test documentation; physical exam results	1 year from date of personnel action
	Employee benefit plans, seniority systems, and merit systems	Full period Plan or system is in effect and for at least one year after its termination
	Records pertinent to legal proceedings	Until final disposition
Employee Retirement Income Security Act of 1974	Form 5500 series annual returns/reports and all necessary supporting data	6 years from applicable filing date
Equal Pay Act	Records relating to: payment of wages; wage rates; job evaluations; job descriptions; merit systems; seniority systems; collective bargaining agreements; records explaining the differences in wage rates between men and women in similar positions	2 years
Fair Labor Standards Act ("FLSA") Equal Pay Act Family and Medical Leave Act	For each employee, payroll records containing: full name; home address; date of birth, if under 19; sex and occupation; time of day and day of week on which work week begins; regular hourly pay rate or other basis for payment; hours worked each work day and total hours worked each work week; daily and weekly straight time earnings; total premium pay for overtime; wage deductions and/or additions; total wages per pay period; date of payment and pay period covered; certificates, agreements, plans, notices; sales and purchase records	3 years from last date of entry
	Supplementary basic records, including: from the date of last entry, all time sheets or documents on which are entered daily starting and stopping times; from their last effective date, wage rate tables; order, shipping, and billing records; records of additions to or deductions from wages paid	2 years from the date of last entry or, for wage rate tables, from their last effective date
Family and Medical Leave Act	Same as FLSA, and: dates or hours of leave taken by eligible employees; notices furnished to employees; documents describing benefits or policies/practices regarding leave; records of dispute that involve the designation of leave	3 years
Immigration Reform and Control Act	I-9 Form signed by new employees and the employer	The later of: 3 years after hire date or 1 year after termination
Occupational Safety and Health Act	Log and supplemental record of occupational illnesses and injuries; post a completed annual summary of injuries and illnesses	5 years following the end of the calendar year covered by the record
	Employee medical records and records of exposure to toxic substances	Duration of employee's employment plus 30 years
Title VII of the Civil Rights Act of 1964 ("Title VII")	Applications and other personnel records, including records relating to: hiring; promotions; transfers; demotions; layoffs; terminations; rates of pay; training selection; records relating to reasonable accommodation requests	1 year from personnel action or making of the record; if an EEOC charge or lawsuit is filed, all relevant records, including records relating to possible comparators, shall be kept until final disposition of the charge or lawsuit
	Personnel records of individuals involuntarily terminated	1 year from the date of termination
Americans with Disabilities Act	Same as Title VII	Same as Title VII
Virginia Unemployment Compensation Statute	For each worker, records identifying: state or states in which services are performed; date of hire; date of work cessation and reason therefor; scheduled hours; total wages in each pay period; other remuneration; special payments such as annual bonuses or prizes; payments for travel or other business expense; location of worker's services within or outside U.S. and dates of such services	4 years from payment date of unemployment tax
Virginia Child Labor Statute	Time book or time cards and ending time of work each day with amount of time designated as free-from-duty meal period	36 months from date of latest work period recorded for minor employee involved

*This chart is a summary only. For complete and precise descriptions of the types of records to be retained, and the retention periods, please consult the applicable statute or regulation.*

## EMPLOYERS MAY PAY A HIGH PRICE FOR VIOLATIONS OF COVENANTS NOT TO COMPETE

CONTINUED FROM FRONT COVER

The Judge found that where the department store advised the salesmen to solicit their former customers, despite its knowledge of the existence and terms of their covenant not to compete, it had participated in a civil conspiracy. Under Virginia law, a civil conspiracy exists where two or more persons willfully combine forces to injure the trade or business of another person. The civil conspiracy statute allows the victim to recover three times their actual damages as well as their attorneys' fees. In this case, the plaintiff was awarded over 1.5 million dollars plus attorneys' fees.

Employers are often reluctant to take legal action against former employees who they believe may be violating a noncompete agreement. Even if they can convince a judge to enforce the agreement and enjoin the employee from working for the competitor, the employee is not often in a position to pay an award of damages or the employer's attorneys' fees. However, if the employer believes that the competitor has encouraged or participated in the employee's breach of the noncompete agreement, this can change the equation considerably by adding a much deeper pocket and the possibility of triple damages.

Fortunately for employers, while the possible penalties can be quite severe, this risk is manageable, especially in light of the many advantages of hiring competitors' former employees. Employers faced with this situation would be well advised to first consult a local attorney regarding whether the covenant not to compete is valid. The law of noncompete agreements in Virginia is evolving, and many judges are extremely hostile to them, especially 'one size fits all' contracts that fail to reflect the economic realities of the location where the former employer seeks enforcement. In any event, employers must be extremely cautious to avoid any appearance of collusion with the potential hire to lure business away from the competitor through unlawful use of the competitor's protected information. ■

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*Our lawyers are committed to the needs of our clients.*